

United States Court of Appeals

District of Columbia Circuit

NOTICE OF FINAL RULE

In accordance with the provisions of D.C. Circuit Rule 47, notice of proposed amendments to D.C. Circuit Rules 28(c) and 36(c), and revisions to the *Handbook of Practice and Internal Procedures*, was provided on November 21, 2001, with an opportunity for comment.

The Advisory Committee on Procedures received comments on the proposed amendments. After consideration of these comments, the Advisory Committee transmitted to the Court its recommendation that the proposed amendments be adopted in final form with no revisions. The Court considered the comments of the Advisory Committee and accepted its recommendation. The Court has ordered that the amendments to the rules be adopted, effective January 1, 2002.

Copies of this notice have been published this date by the means specified in D.C. Circuit Rule 47.

Issued: December 19, 2001

/s/Mark J. Langer
Mark J. Langer
Clerk

United States Court of Appeals
For the District of Columbia Circuit

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges.

ORDER

It is ORDERED by the Court, *en banc*, that Circuit Rules 28(c) and 36(c) be amended to read as follows:

Circuit Rule 28

Briefs

[Sections (a), (b), (d), (e), (f), and (g) are unchanged and omitted.]

(c) Citation to Unpublished Disposition.

(1) Unpublished Dispositions of this Court.

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(C) Applicability to pending cases. The provisions of Rule 28(c)(1)(B) apply to any appeal or other proceeding pending in this court on or after January 1, 2002.

(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts may be cited when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished opinions by other courts of appeals may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts may not be cited.

(3) **Procedures Governing Citation to Unpublished Dispositions.** Counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited in the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

Circuit Rule 36

Decisions of the Court; Opinions and Abbreviated Dispositions

[Sections (a), (b), and (d) are unchanged and omitted.]

(c) Unpublished Opinions.

(1) An opinion, memorandum, or other statement explaining the basis for this court's action in issuing an order or judgment under subsection (b) above, which does not satisfy any of the criteria for publication set out in subsection (a) above, will nonetheless be circulated to all judges on the court prior to issuance. A copy of each such unpublished opinion, memorandum, or statement will be retained as part of the case file in the clerk's office and be publicly available there on the same basis as any published opinion.

(2) While unpublished orders and judgments may be cited to the court in accordance with Circuit Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.

It is further ORDERED by the Court, *en banc*, that the Court's *Handbook of Practice and Internal Procedures* be amended to read as follows:

Handbook Revisions

IX. BRIEFS AND APPENDIX

Page 41: Revise the second paragraph before the end of the page.

Circuit Rule 28(c) has been significantly revised. The new Rule 28(c)(1)(A) retains the provisions of the earlier Rule 28(c) for unpublished dispositions entered by the Court before January 1, 2002. Thus, under Circuit Rule 28(c)(1)(A), counsel may not cite as precedent the unpublished orders, judgments, sealed opinions, or explanatory memoranda entered by this Court. Counsel *may* refer to an unpublished disposition when arguing that it has *res judicata*, law of the case, or preclusive effect, but not for its effect as precedent.

The new Rule 28(c)(1)(B) makes a major change in the Court's practice, for cases pending with the Court on or after January 1, 2002. Counsel will be allowed to cite as precedent all unpublished dispositions of the D.C. Circuit, provided those dispositions were entered by the Court on or after January 1, 2002. Unpublished dispositions include any order, judgment, explanatory memorandum, or other disposition, including interlocutory rulings and summary orders (but not sealed dispositions). (As before, counsel may also cite an unpublished disposition of this Court when arguing that it has *res judicata*, law of the case, or preclusive effect.)

The new Rule 28(c)(2) provides that counsel may also cite unpublished dispositions of other courts of appeals and district courts where they are relevant for purposes of *res judicata*, law of the case, or their preclusive effect. Otherwise, unpublished opinions of other courts of appeals may be cited only in the circumstances and for the purposes allowed by the court issuing the disposition, and unpublished dispositions of district courts may not be cited.

If counsel cite to unpublished dispositions under Rule 28(c), counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief, but it should be separated from the body of the brief and any other addendum by a distinctly colored separation page. If the addendum is bound separately, counsel must file and serve it concurrently with, and in the same number of copies as, the brief itself.

It is important to understand both the significance of the revised Rule 28(c), as well as an important caveat in connection with reliance upon unpublished dispositions. For example, counsel will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue; they may also argue that an unpublished disposition establishes an intra-circuit conflict in decisions warranting a rehearing *en banc*. On the other hand, counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition. See the new Circuit Rule 36(c)(2). Indeed, unpublished dispositions will contain language to that very effect. Thus, counsel should recognize that the Court believes that its published precedents already establish and adequately explain the legal principles applied in the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions. (*See generally* Circuit Rule 36 which sets out the criteria for published and unpublished opinions.)

XII. MAKING THE DECISION

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A. FORMS OF DECISION

(*See* Fed. R. App. P. 36; D.C. Cir. Rule 36.)

Four possible forms for disposing of cases that have been considered by a merits panel are currently used: a published signed opinion, a published *per curiam* opinion, an unpublished

judgment or order with memorandum, and a judgment or order without memorandum. The first two forms are familiar to all attorneys. An unpublished judgment or order with memorandum is addressed primarily to those immediately concerned with the case. The memorandum usually is fairly brief, stating only the facts and law necessary for an understanding of the Court's decision. A judgment or order without memorandum indicates affirmance or reversal, or grant or denial of a petition for review, with a brief explanation, such as citation of a governing precedent or adoption of the reasoning of the district court or agency. With the exception of orders filed under seal and some scheduling orders generated by the Court's docketing system, all orders and judgments, including Clerk's orders, issued on or after June 1, 2001, are available over the Internet via PACER, the Judiciary's electronic public access service. A small "image" icon appears next to the docket entry for any order or judgment that can be viewed online. The date of issuance is also a link to the image file (in PDF format). A PACER account is required (available from the PACER Service Center), and a per page fee applies. The PACER Service Center can be accessed through a link at the Court's web site, www.cadc.uscourts.gov.

Circuit Rule 36(a)(2) sets out the criteria the Court employs in determining whether to publish an opinion. The Court's policy is to publish an opinion or memorandum, meeting one or more of the following criteria: (1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies, or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that give it general public interest.

An unpublished opinion will be used where the Court's disposition does not satisfy the criteria for publication under Circuit Rule 36(a). Citation of unpublished opinions is governed by Circuit Rule 28(c). Although Rule 28(c) will permit citation, as precedent, of unpublished opinions issued on or after January 1, 2002, Circuit Rule 36(c)(2) makes clear that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition, *i.e.*, the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents.

These amendments are effective January 1, 2002.

Per Curiam
FOR THE COURT:

/s/Mark J. Langer
Mark J. Langer
Clerk

Filed: December 19, 2001